

<b>RICK LEE REIN</b>	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,007,130
<b>SOLOMON CORPORATION</b>	)	
Respondent	)	
AND	)	
	)	
<b>LIBERTY MUTUAL INSURANCE COMPANY</b>	)	
Insurance Carrier	)	

Claimant appeals the May 3, 2004 Award of Administrative Law Judge John D. Clark. Claimant was awarded benefits for a scheduled injury to the left upper extremity at the level of the shoulder after the Administrative Law Judge (ALJ) determined that claimant did not suffer permanent injury to his cervical spine arising out of and in the course of his injuries. The Appeals Board (Board) heard oral argument on October 12, 2004.

Claimant appeared by his attorney, Brian D. Pistotnik of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, Robert J. Wonnell of Kansas City, Kansas.

The Board has considered the record and adopts the stipulations contained in the Award of the Administrative Law Judge. Additionally, the parties acknowledged at oral argument before the Board that the date of accident alleged on March 16, 2001, resulted in no permanent impairment for claimant. Claimant acknowledged experiencing a full resolution of his problems after receiving chiropractic treatments. Claimant's allegation of a permanent impairment, including his request for a permanent partial general work disability, stems from the August 2, 2002 date of accident.

**ISSUES**

- (1) What is the nature and extent of claimant's injury and disability? More particularly, did claimant suffer a scheduled injury to the left upper extremity at the level of the shoulder, or is claimant entitled to a permanent partial general disability for injuries extending into his cervical spine?
- (2) If claimant is entitled to a permanent partial general disability under K.S.A. 44-510e, is claimant entitled to a work disability, having been terminated for cause from respondent's employment?
- (3) What is the average weekly wage, including the fringe benefits, claimant was receiving from respondent on the date of accident?

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the Administrative Law Judge should be modified with regard to the average weekly wage, but affirmed in all other respects.

The Award sets out findings of fact and conclusions of law in some detail and it is not necessary to repeat those herein. The Board adopts those findings and conclusions as its own.

Claimant suffered a temporary injury to his left shoulder and neck on March 16, 2001, while rolling a transformer, which weighed over 100 pounds, into place. Claimant's job required that he transport electrical transformers, as respondent was in the business of rebuilding those electrical transformers. After the March 16, 2001 incident, claimant received temporary chiropractic care, which resulted in a full resolution of claimant's symptoms.

Claimant continued his regular work through August 2, 2002, when he again injured his left shoulder and neck while rolling a substantially larger transformer than he was handling on March 16, 2001. The incident was reported to his immediate supervisor, Douglas Weller. Claimant iced his shoulder and neck down, but started noticing numbness and pain. Claimant was again authorized to obtain chiropractic care, this time in Abilene, Kansas. After three treatments, the chiropractor, Kari L. Porter, D.C., determined that claimant's condition was more serious than she was willing to treat and advised he see a medical doctor.

Claimant was referred to physician's assistant Michael Guhr and underwent a program of physical therapy. On October 29, 2002, an MRI was performed. Claimant described the MRI as being of the neck and shoulder. However, the two health care providers who testified in this matter, Pedro A. Murati, M.D. (board certified in electrodiagnostic medicine, rehabilitation and physical medicine and certified as an independent medical examiner) and C. Reiff Brown, M.D. (a board certified orthopedic surgeon), both reviewed either the MRI or the report associated with the MRI. In both instances, the doctors testified that the MRI displayed claimant's shoulder only, with no reference to claimant's cervical spine.

Dr. Murati found that claimant suffered moderate AC crepitus at the left shoulder level, with limited range of motion in the cervical spine. He diagnosed myofascial pain syndrome in the neck, but acknowledged that claimant's findings were not sufficient to support a finding of radiculopathy from the cervical spine pursuant to the criteria of the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

Dr. Brown found claimant's MRI to be normal, with nerve conduction studies of the shoulder also normal. He acknowledged claimant had a significant carpal tunnel syndrome impairment in the left hand and tenderness in the upper trapezius area. However, the range of motion of the neck was normal and pain free except for some discomfort at the very end of the range of motion. Dr. Brown assessed claimant at 10 percent impairment to the left upper extremity, also pursuant to the AMA *Guides* (4th ed.), with an additional 2 percent for the shoulder, for a combined 12 percent impairment to the left upper extremity. Dr. Murati had earlier assessed claimant a 10 percent impairment to the left upper extremity for the carpal tunnel syndrome, with a 5 percent impairment for the moderate AC crepitus of the shoulder, which combined to a 15 percent impairment to the left upper extremity.

The ALJ determined that claimant had failed to prove that he suffered any permanent injury to his neck and, therefore, limited his award to a 12 percent impairment to the left upper extremity at the level of the shoulder after considering the ratings of Dr. Brown and Dr. Murati, apparently deciding the opinion of Dr. Brown was the most credible.

The Board, in reviewing the evidence, affirms the ALJ's determination that claimant's injury is limited to his left upper extremity at the level of the shoulder. While claimant did discuss symptoms in the cervical spine, the testimony of Dr. Murati could only support a vague diagnosis of myofascial pain syndrome without radiculopathy. Dr. Brown's evaluation determined claimant's injury was limited to his left upper extremity at the level of the shoulder, with no permanent impairment in the cervical spine. The Board finds Dr. Brown's opinion to be the more persuasive opinion in the record and affirms that finding.

The parties stipulated at regular hearing that claimant had an average weekly wage of \$612.50 without including fringe benefits. At oral argument before the Board, the parties also stipulated that claimant had health insurance and a 401(k) plan at various times while employed with respondent. The parties agreed that claimant's average weekly wage with the health insurance, but without the 401(k) plan inclusion, would be \$614.79. The parties agreed that with the 401(k) plan included, the average weekly wage would then be \$620.92.

Claimant testified that he was at one time enrolled in the 401(k) plan, but at some point had dropped out of the program. Claimant was only able to testify that during the year preceding the accident, he contributed a portion of his income to the retirement plan and the employer contributed a 2 percent contribution to that retirement plan. However, claimant acknowledged that he was only in the 401(k) plan for approximately half of the year preceding the accident, with no determination as to what dates were included. Claimant acknowledged at the time of the August 2, 2002 injury, he was not participating in the 401(k) retirement program.

In workers compensation litigation, it is the claimant's burden to prove his entitlement to benefits by a preponderance of the credible evidence.<sup>1</sup> K.S.A. 2002 Supp. 44-511 does include employer contributions to pension and profit sharing plans under the definition of the term "additional compensation."<sup>2</sup> However, on the date of accident of August 2, 2002, claimant was not participating in the 401(k) plan. The Board, therefore, finds that that portion of claimant's fringe benefits cannot be added to the average weekly wage pursuant to K.S.A. 2002 Supp. 44-511. The Board, therefore, finds pursuant to the stipulation of the parties, that claimant's average weekly wage on the date of accident including the cost of the health insurance benefit is \$614.79. The award will be modified to reflect that slightly higher average weekly wage.

### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge John D. Clark dated May 3, 2004, should be, and is hereby, modified to award claimant a 12 percent impairment to the left upper extremity at the level of the shoulder based upon an average weekly wage of \$614.79. The resulting compensation rate is, therefore, raised to \$409.88 per week.

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<sup>1</sup> K.S.A. 44-501 and K.S.A. 2002 Supp. 44-508(g).

<sup>2</sup> K.S.A. 2002 Supp. 44-511(a)(2).

Claimant is entitled to 27 weeks compensation at the rate of \$409.88 totaling \$11,066.76 for a 12 percent permanent partial loss of use of the left upper extremity at the level of the shoulder. As of the date of this award, the entire amount would be due and owing and ordered paid in one lump sum, minus any amounts previously paid.

In all other regards, the Award of the Administrative Law Judge is affirmed insofar as it does not contradict the findings and conclusions contained herein.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of November 2004.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Brian D. Pistotnik, Attorney for Claimant  
Robert J. Wonnell, Attorney for Respondent and its Insurance Carrier  
John D. Clark, Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director